Supreme Court, U. S.
FILED
JUN 6 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1948

WILLIAM HOWARD BORRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

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OCTOBER TERM, 1978

No.

WILLIAM HOWARD BORRE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Your petitioner William Howard Borre respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above entitled cause on May 7, 1979 which judgment affirmed the judgment of conviction of the United States District Court for the District of New Jersey wherein petitioner was convicted of possession and transportation of stolen goods in violation of Title 18, United States Code, Sections 659 and 2314.

Citation to Opinion Below

The opinion of the United States Court of Appeals for the Third Circuit is set forth in Appendix A infra. It has not as yet been officially reported.

Jurisdiction

The judgment of the Court of Appeals was entered on May 7, 1979 (Appendix B infra). The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Questions Presented for Review

1. Does the right to a speedy trial (whether under the Speedy Trial Act, Title 18, United States Code, Section 3161 et seq. and/or the Sixth Amendment to the United States Constitution) apply to the period between the dismissal of a criminal complaint and a subsequent indictment thereon?

2. Did the Government violate petitioner's due process rights under the Fifth Amendment to the United States Constitution by the pre-indictment delay in the instant case?

Statutes Involved

The statutory provisions involved are Title 18, United States Code, Section 3161 et seq. and in particular Sections 3161 (d) and (h)(6) which are set forth in Appendix C infra.

Statement of the Case

Petitioner William Borre was driving a tractor trailer in New York on May 5, 1977 when he was stopped by Agents of the Federal Bureau of Investigation (Vol. IV-84a).[1] Inside the trailer were certain General Electric radios which had previously been stolen (Vol. IV-89a). Petitioner advised the Agents that he was the owner of a warehouse in East Brunswick, New Jersey and that one Edward Gibbons of Chicago had stored the radios in his warehouse (Vol. IV-92a to 93a). He told the Agents that there were additional radios in his warehouse and consented to a search of the warehouse (Vol. IV-96a).

The Agents searched petitioner's warehouse later that day and confiscated the radios as well as certain Lederle drugs which were recognized by them to also have been previously stolen (Vol. IV-98a). The Agents also confiscated other stored items.

On May 12, 1977 petitioner was arrested pursuant to a criminal complaint charging him with the unlawful possession of the Lederle products in violation of Title 18, United States Code, Section 659. The complaint also referred to the possession of the stolen radios. Petitioner was subsequently released on a $25,000.00 unsecured appearance bond after being incarcerated for 5 days. On May 19, 1977 he was subpoenaed to appear before a federal grand jury hearing his case and in fact appeared and testified before that body on June 23, 1977. On June 24, 1977 the United States Attorney obtained an Order pursuant to Rule 48 (a) of the Federal Rules of Criminal Procedure dismissing the complaint against peti-

[1] Reference is made to the trial transcript which was filed in the Court of Appeals.

tioner "for the reason that prosecution at this time is not in the best interest of the United States". Neither petitioner nor his counsel were ever advised of the dismissal, petitioner never received notification that he was released from his bond, nor were any confiscated items returned to him. Thereafter two brothers of petitioner and two of his employees were subpoenaed to testify on August 25, 1977 before a grand jury. No further activity took place until May 8, 1978 when petitioner's counsel was advised by the Government that a grand jury was going to hear testimony in the matter and affording petitioner the opportunity to testify.[2] On May 25, 1978 a three count indictment was returned charging the transportation of the radios from New Jersey to New York on May 5, 1977 and the possession of the radios and Lederle products in the warehouse on the same date.[3] It is clear that all of the factual allegations contained in the indictment were known to the Government as early as May 5, 1977.

Defendant was arraigned on the indictment on June 2, 1978. He was released on a $5,000.00 unsecured appearance bond. A trial date was set for July 17, 1978 (Vol. I-92). on June 9, 1978 defendant filed a motion to dismiss the indictment for violation of defendant's speedy trial rights which motion was denied on June 27, 1978 (See Vol. II). Defendant thereafter substituted counsel and a request for a two week trial adjournment was made by new counsel (27A, 28A), which application was de-

[2] Petitioner's counsel never conveyed this opportunity to petitioner and instead the grand jury was given a transcript of petitioner's earlier June, 1977 testimony. (21A;27A)

[3] In violation of Title 18, United States Code, Sections 2314 and 659 respectively.

nied. A further request for adjournment was made on the day of trial by defendant which was also denied.[4] The trial proceeded with original counsel and defendant was convicted of all three counts of the indictment on July 21, 1978. He was sentenced on September 11, 1978 to a prison term of 4 years (Vol. IX-17). The conviction was appealed to the United States Court of Appeals for the Third Circuit which affirmed. Petitioner is presently at liberty on bail.

Reasons for Granting the Writ

(a) The speedy trial issue here raised has not been the subject matter of prior decision by the Court and appears to have resulted in a diversity of opinion among the federal judiciary. Compare *United States* v. *Avalos,* 541 F2d 1100, 1108 (5th Cir. 1976), *United States* v. *Koch,* 438 F. Supp. 307 (S.D.N.Y. 1977), *United States* v. *Lopez,* 426 F. Supp. 380 (S.D.N.Y. 1977), *United States* v. *Beberfeld,* 408 F. Supp. 1119 (D.D.N.Y. 1976) and the lower court decision in *United States* v. *Hillegas,* 443 F. Supp. 221 (S.D.N.Y. 1977) with *United States* v. *Hillegas,* 578 F2d 453 (2d Cir. 1978).

The problem is compounded by the language in the Speedy Trial Act. Thus Title 18, United States Code, Section 3161 (d) provides that the time limits of the act apply:

> "If . . . any charge contained in a complaint filed against an individual is dismissed or otherwise

[4] Although the Government delayed the indictment for over twelve months the trial court would not grant a two week adjournment of the trial to permit new counsel to familiarize himself with the matter —thus necessitating a substitution back to original counsel.

> dropped, and thereafter . . . an . . . indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode[5] . . ."

Title 18, United States Code, Section 3161 (b), which the Court below improperly relied upon, in part, states that the delay in the filing of the subsequent indictment is excluded from the time limits of the Act:

> "If the information or indictment[6] is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense. . . ."

It is submitted that the last cited statutory section is inapplicable herein in that no indictment was dismissed. As noted the complaint was dismissed which results in the applicability of Section 3161 (d).

The issue to be resolved can be simply stated as follows: can the Government be immune from challenge when it on its own motion dismisses a complaint and thereafter obtains an indictment on the same offense or arising out of the same criminal episode so long as the indictment was obtained within the statute of limitations for the particular crime? Or alternatively, can the Government circumvent the clear legislative policy expressed in the Speedy Trial Act which policy reinforces the constitutional protection of speedy trial afforded under the Sixth Amendment to the United States Constitution? It is submitted that

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[5] There can be no question that in the instant case petitioner's indictment deals with the same criminal episode as the original complaint.

[6] In this case the complaint was dismissed.

such conduct of the Government can not be condoned. Furthermore, the Government should not be able to successfully urge that any violation herein is immune from relief as the sanctions of the Speedy Trial Act do not go into effect until July 1, 1979. Unfortunately the Court below also appears to give some weight to this position. The constitutional protection itself provides ample sanctions when there is a violation of the right to a speedy trial. See *United States* v. *Carini*, 562 F2d 144, 148 (2d Cir. 1977) and *Barker* v. *Wingo*, 407 U.S. 514 (1972). As stated by this Court in *Klopfer* v. *State of North Carolina*, 386 U.S. 213, 226 (1967) the right to a speedy trial "is one of the most basic rights preserved by our Constitution".

Let us now reexamine the history of this case. On May 5, 1977 the Government (1) obtained possession from petitioner of the General Electric radios and the Lederle products; (2) identified the two hijackings of these products; (3) obtained identification from witnesses that the aforementioned products in possession of petitioner were the same ones that were stolen; and (4) stopped petitioner in New York and obtained his statement that he had transported the General Electric radios that day from New Jersey. Petitioner also supplied the Government with the name, address and telephone number of the person from whom he received the stolen goods. (The only testimony produced at trial to refute this information was that the telephone number belonged to someone else—information which the Government could have obtained by merely calling the telephone number given by petitioner).

It is submitted that in May, 1977 the Government had available its witnesses and possessed the information it needed to indict and try the petitioner. This case, as evidenced by the indictment and trial, was totally free of com-

plexity. The diligent work of the Federal Agents on May 5, 1977 presents an interesting contrast to the total lack of effort by the United States Attorney between May 1977 and May 1978. The criminal complaint filed against petitioner on May 11, 1977, while not charging him with possession of the General Electric radios, refers to the possession of the radios, and does not differ in substance with the indictment rendered a year later. It is clear that the indictment deals with only the total criminal episode of May 5, 1977. While not wanting to sound sarcastic it would appear that the Government could have tried its case against petitioner after it completed its search and the identification process on May 5, 1977.

The only explanation in the record below for the delay in this case is the statement by the Government attorney that "it became evident after Mr. Borre's arrest that there was a great deal more to be done with the case than had been up until that time" (Vol. 1-2a). The contents of the indictment and a review of the trial do not support that assertion. As stated by Mr. Justice Brennan in his concurring opinion in *Dickey* v. *Florida,* 398 U.S. 30 (1970):

> "Thus the crucial question in determining the legitimacy of governmental delay may be whether it might reasonably have been avoided—whether it was unnecessary." *Supra,* 398 U.S. at p. 52.

The trial judge denied the motion to dismiss and based its reason therefor on the "enlarged charges" in the indictment against defendant (Vol. II-3a). As heretofore pointed out this was an incorrect assumption. Even the Government conceded that the final charges against petitioner were the same as those in the original complaint (Vol. 1-5a). Indeed, as noted, the original complaint differs only in that it does not set forth three separate charges. The facts in the complaint and the indictment

are the same (Title 18, United States Code 3161 (d)). And, as previously stated, the facts contained in the indictment were all known to the Government on May 5, 1977.

(b) In addition to petitioner's Sixth Amendment rights attention is drawn to his due process rights under the Fifth Amendment to the United States Constitution. See *United States* v. *Barket,* 530 F2d 189 (8th Cir. 1976) which states that pre-prosecution delays may violate the right of a defendant to due process of law. As stated in *United States* v. *Lovasco,* 431 U.S. 783 (1977) the issue is whether the actions of the Government violates "fundamental conceptions of justice." See also *Petition of Provoo,* 17 F.R.D. 183, 203 (D.C. Md. 1955) aff'd. mem. sub. nom. 350 U.S. 857 (1955).

The appellate court herein rejected the argument herein advanced stating that petitioner was not subject to the "actual restraints imposed by arrest." See also *United States* v. *Flores,* 501 F2d 1356, 1359 (2d Cir. 1974). In the instant case however, petitioner was never advised of the dismissal, was bound (insofar as he was concerned) by the restrictive terms of his release (17A), was relieved of considerable personal property which was not returned by the government (11A through 14A), and was subjected to anxiety and concern. As stated in *United States* v. *Marion,* 404 U.S. 307 (1971):

> "Arrest is a public act that may seriously interfere with the defendant's liberty whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends."

The following from the concurring opinion in *Marion,* is also noteworthy:

> "The duty which the Sixth Amendment places on Government officials to proceed expeditiously with criminal prosecutions would have little meaning if those officials could determine when that duty was to commence."

It is submitted that the Government's actions violated petitioner's Fifth Amendment rights.

CONCLUSION

For the foregoing reasons this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

PETER S. VALENTINE
Attorney for Petitioner

APPENDIX A

Opinion of the United States Court of Appeals for the Third Circuit

No. 78-2259

UNITED STATES OF AMERICA,

v.

WILLIAM HOWARD BORRE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(D. C. CRIM. No. 78-00147)

Submitted under Third Circuit Rule 12(6)
May 4, 1979

Before:

ADAMS, GIBBONS and WEIS, Circuit Judges

(Filed May 7, 1979)

[1a]

Appendix A

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Attorneys for Appellee

PER CURIAM

After a search of William Howard Borre's truck and warehouse in May, 1977, which led to the discovery of several items believed to be stolen, a criminal complaint was filed charging Borre with the unlawful possession of stolen goods in violation of 18 U.S.C. § 659. Borre was arrested on May 11, 1977, the date the complaint was filed.

On June 24, 1977, one day after Borre appeared before a federal grand jury, the United States Attorney obtained an order dismissing the complaint.

Almost a year later, on May 25, 1978, Borre was indicted for the possession and transportation of stolen goods in violation of 18 U.S.C. §§ 659 and 2314. The activities alleged in the indictment as being in violation of the statutes were the events of the previous May.

Appendix A

Defendant contends that his right to a speedy trial as guaranteed by 18 U.S.C. § 3161 *et seq.* (The Speedy Trial Act) and the fifth and six amendments was violated, and that the indictment should have been dismissed with prejudice. In order for the claim to be even colorable, it must be shown that the period between the June, 1977 dismissal of the complaint and the July 17, 1978 trial should be considered in evaluating this contention.

Although the Speedy Trial Act is silent as to this question, 18 U.S.C. § 3161(h)(6) provides that where an indictment or information is dismissed upon motion of the government, and a charge alleging the same offense is thereafter filed, the period between the dismissal and the new filing is not to be considered in determining whether the statute has been violated. The District Plan for the Implementation of the Speedy Trial Act ("Plan") adopted by the District Court for the District of New Jersey pursuant to 18 U.S.C. § 3165 is to the same effect. We hold that the present situation should be treated in the same manner.[1] *U.S.* v. *Hillegas,* 578 F.2d 453 (2d Cir. 1978); *U.S.* v. *Flores,* 501 F.2d 1356 (2d Cir., 1974).

Defendant's attempt to have us consider the post-dismissal/pre-indictment period for purposes of his fifth and sixth amendment claims is likewise rejected since defendant was not subject or the actual restraints imposed by arrest. See *U.S.* v. *Lorasco,* 431 U.S. 783 (1977); *U.S.* v. *Marion,* 404 U.S. 307 (1971).

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[1] Even if there were a violation of the Speedy Trial Act, 18 U.S.C. § 3162, which provides for dismissal of the indictment for violations of the Act, the Act does not become effective until July 1, 1979, and § III, 10(d) of the New Jersey Plan states that failure to comply with the applicable time limits does not require dismissal.

Appendix A

We have examined defendant's other contentions, and find that they are likewise without merit. Accordingly, the judgment of the District Court will be affirmed.

To the Clerk:

Kindly file the foregoing opinion.

By the Court:

Dated:

APPENDIX B

Judgment of the United States Court of Appeals for the Third Circuit

No. 78-2259

United States of America,

vs.

Borre, William Howard,

Appellant.

(D. C. Criminal No. 78-00147)

On Appeal from the United States District Court for the District of New Jersey

Present:

Adams, Gibbons and Weis, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit Rule 12(6) on May 4, 1979.

Appendix B

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed September 13, 1978, be, and the same is hereby affirmed.

ATTEST:

THOMAS P. QUINN
Clerk

May 7, 1979

APPENDIX C

Statutory Provisions Cited

18 U.S.C. Section 3161 (d)

If any indictment or information is dismissed upon motion of the defendant, or any charge contained in a complaint filed against an individual is dismissed or otherwise dropped, and thereafter a complaint is filed against such defendant or individual charging him with the same offense or an offense based on the same conduct or arising from the same criminal episode, or an information or indictment is filed charging such defendant with the same offense or an offense based on the same conduct or arising from the same criminal episode, the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information, as the case may be.

18 U.S.C. Section 3161 (h) 6

The following periods of delay shall be excluded in computing the time within which an information or an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(6) If the information or indictment is dismissed upon motion of the attorney for the Government and thereafter a charge is filed against the defendant for the same offense, or any offense required to be joined with that offense, any period of delay from the date the charge was dismissed to the date the time limitation would commence to run as to the subsequent charge had there been no previous charge.